February 29, 2016

ENGROSSED
SENATE BILL No. 28

DIGEST OF SB 28 (Updated February 29, 2016 3:07 pm - DI 123)

Citations Affected: IC 34-18.

Synopsis: Medical malpractice. Allows a plaintiff to commence a "direct file" action against a health care provider without submitting a proposed complaint to a medical review panel if the plaintiff's recovery totals $35,000 or less. Increases the amount of recoverable damages for injury or death to a patient from $1,250,000 to: (1) $1.65 million on January 1, 2017; (2) $1.80 million on January 1, 2019; (3) $1.95 million on January 1, 2023; (4) $2.10 million on January 1, 2027, and (5) $2.25 million on January 1, 2031. Establishes a timetable for health care provider liability limits. Provides a formula for periodic payment agreements. Requires the 2032 legislative assembly to review the following topics: (1) the "direct file" threshold amount; (2) the total amount of recoverable damages for injury or death to a patient; and (3) health care provider liability limits. Provides that attorney fees may not exceed 32% of the total recovery. Makes conforming technical corrections.

Effective: January 1, 2017.

Steele, Head, Buck,
Randolph Lonnie M

(HOUSE SPONSORS — KOCH, STEUERWALD)

January 5, 2016, read first time and referred to Committee on Civil Law.
January 26, 2016, reported favorably — Do Pass.
January 28, 2016, read second time, ordered engrossed. Engrossed.
February 1, 2016, read third time, passed. Yeas 50, nays 0.

HOUSE ACTION

February 8, 2016, read first time and referred to Committee on Judiciary.
February 29, 2016, amended, reported — Do Pass.

February 29, 2016

Second Regular Session 119th General Assembly (2016)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type.~~

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~*this style type*~~ reconciles conflicts between statutes enacted by the 2015 Regular Session of the General Assembly.

ENGROSSED
SENATE BILL No. 28

A BILL FOR AN ACT to amend the Indiana Code concerning civil law and procedure.

Be it enacted by the General Assembly of the State of Indiana:

SECTION 1. IC 34-18-0.5 IS ADDED TO THE INDIANA CODE AS A **NEW** CHAPTER TO READ AS FOLLOWS [EFFECTIVE JANUARY 1, 2017]:

Chapter 0.5. Implementation

Sec. 1. The general assembly emphasizes, to the parties, the courts, and the medical review panels, that adhering to the timelines set forth in this article is of extreme importance in ensuring the fairness of the medical malpractice act. Absent a mutual written agreement between the parties for a continuance, all parties subject to this article, and all persons charged with implementing this article, including courts and medical review panels, shall carefully follow the timelines in this article. No party may be dilatory in the selection of the panel, the exchange of discoverable evidence, or in any other matter necessary to bring a case to finality, and the courts and medical review panels shall enforce the timelines set forth in this article so as to carry out the intent of the general assembly.

SECTION 2. IC 34-18-4-1 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JANUARY 1, 2017]: Sec. 1. Financial responsibility of a health care provider and the provider's officers, agents, and employees while acting in the course and scope of their employment with the health care provider may be established under subdivision (1), (2), or (3):

(1) By the health care provider's insurance carrier filing with the commissioner proof that the health care provider is insured by a policy of malpractice liability insurance in ~~the amount of~~ at least ~~two hundred fifty thousand dollars ($250,000)~~ **the amount specified in IC 34-18-14-3(b)** per occurrence and ~~seven hundred fifty thousand dollars ($750,000)~~ **three (3) times that amount** in the annual aggregate, except for the following:

(A) If the health care provider is a hospital, as defined in this article, the minimum annual aggregate insurance amount is as follows:

(i) For hospitals of not more than one hundred (100) beds, ~~five million dollars ($5,000,000).~~ **twenty (20) times the amount specified in IC 34-18-14-3(b).**

(ii) For hospitals of more than one hundred (100) beds, ~~seven million five hundred thousand dollars ($7,500,000).~~ **thirty (30) times the amount specified in IC 34-18-14-3(b).**

(B) If the health care provider is a health maintenance organization (as defined in IC 27-13-1-19) or a limited service health maintenance organization (as defined in IC 27-13-34-4), the minimum annual aggregate insurance amount is ~~one million seven hundred fifty thousand dollars ($1,750,000).~~ **seven (7) times the amount specified in IC 34-18-14-3(b).**

(C) If the health care provider is a health facility, the minimum annual aggregate insurance amount is as follows:

(i) For health facilities with not more than one hundred (100) beds, ~~seven hundred fifty thousand dollars ($750,000).~~ **three (3) times the amount specified in IC 34-18-14-3(b).**

(ii) For health facilities with more than one hundred (100) beds, ~~one million two hundred fifty thousand dollars ($1,250,000).~~ **five (5) times the amount specified in IC 34-18-14-3(b).**

(2) By filing and maintaining with the commissioner cash or surety bond approved by the commissioner in the amounts set forth in subdivision (1).

(3) If the health care provider is a hospital or a psychiatric hospital, by submitting annually a verified financial statement that, in the discretion of the commissioner, adequately demonstrates that the current and future financial responsibility of the health care provider is sufficient to satisfy all potential malpractice claims incurred by the provider or the provider's officers, agents, and employees while acting in the course and scope of their employment up to a total of ~~two hundred fifty thousand dollars ($250,000)~~ **the amount specified in IC 34-18-14-3(b)** per occurrence and annual aggregates as follows:

(A) For hospitals of not more than one hundred (100) beds, ~~five million dollars ($5,000,000).~~ **twenty (20) times the amount specified in IC 34-18-14-3(b).**

(B) For hospitals of more than one hundred (100) beds, ~~seven million five hundred thousand dollars ($7,500,000).~~ **thirty (30) times the amount specified in IC 34-18-14-3(b).**

The commissioner may require the deposit of security to assure continued financial responsibility.

SECTION 3. IC 34-18-8-6 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JANUARY 1, 2017]: Sec. 6. (a) Notwithstanding section 4 of this chapter, a patient may commence an action against a health care provider for malpractice without submitting a proposed complaint to a medical review panel if the patient's pleadings include a declaration that the patient seeks damages from the health care provider in an amount not greater than ~~fifteen~~ **thirty-five** thousand dollars ~~($15,000).~~ **($35,000).** In an action commenced under this subsection (or IC 27-12-8-6(a) before its repeal), the patient is barred from recovering any amount greater than ~~fifteen~~ **thirty-five** thousand dollars ~~($15,000),~~ **($35,000),** except as provided in subsection (b).

(b) A patient who:

(1) commences an action under subsection (a) (or IC 27-12-8-6(a) before its repeal) in the reasonable belief that damages in an amount not greater than ~~fifteen~~ **thirty-five** thousand dollars ~~($15,000)~~ **($35,000)** are adequate compensation for the bodily injury allegedly caused by the health care provider's malpractice; and

(2) later learns, during the pendency of the action, that the bodily injury is more serious than previously believed and that ~~fifteen~~ **thirty-five** thousand dollars ~~($15,000)~~ **($35,000)** is insufficient compensation for the bodily injury;

may move that the action be dismissed without prejudice and, upon dismissal of the action, may file a proposed complaint subject to section 4 of this chapter based upon the same allegations of malpractice as were asserted in the action dismissed under this subsection. In a second action commenced in court following the medical review panel's proceeding on the proposed complaint, the patient may recover an amount greater than ~~fifteen~~ **thirty-five** thousand dollars ~~($15,000).~~ **($35,000).** However, a patient may move for dismissal without prejudice and, if dismissal without prejudice is granted, may commence a second action under this subsection only if the patient's motion for dismissal is filed within two (2) years after commencement of the original action under subsection (a) (or IC 27-12-8-6(a) before its repeal).

(c) If a patient:

(1) commences an action under subsection (a) (or IC 27-12-8-6(a) before its repeal);

(2) moves under subsection (b) (or IC 27-12-8-6(b) before its repeal) for dismissal of that action;

(3) files a proposed complaint subject to section 4 of this chapter based upon the same allegations of malpractice as were asserted in the action dismissed under subsection (b) (or IC 27-12-8-6(b) before its repeal); and

(4) commences a second action in court following the medical review panel proceeding on the proposed complaint;

the timeliness of the second action is governed by IC 34-18-7-1(c).

(d) A medical liability insurer of a health care provider against whom an action has been filed under subsection (a) (or IC 27-12-8-6(a) before its repeal) shall provide written notice to the state health commissioner as required under IC 34-18-9-2.

SECTION 4. IC 34-18-14-3 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JANUARY 1, 2017]: Sec. 3. (a) The total amount recoverable for an injury or death of a patient may not exceed the following:

(1) Five hundred thousand dollars ($500,000) for an act of malpractice that occurs before January 1, 1990.

(2) Seven hundred fifty thousand dollars ($750,000) for an act of malpractice that occurs:

(A) after December 31, 1989; and

(B) before July 1, 1999.

(3) One million two hundred fifty thousand dollars ($1,250,000) for an act of malpractice that occurs:

(A) after June 30, 1999; **and**

(B) before January 1, 2017.

(4) One million six hundred fifty thousand dollars ($1,650,000) for an act of malpractice that occurs:

(A) after December 31, 2016; and

(B) before January 1, 2019.

(5) One million eight hundred thousand dollars ($1,800,000) for an act of malpractice that occurs:

(A) after December 31, 2018; and

(B) before January 1, 2023.

(6) One million nine hundred fifty thousand dollars ($1,950,000) for an act of malpractice that occurs:

(A) after December 31, 2022; and

(B) before January 1, 2027.

(7) Two million one hundred thousand dollars ($2,100,000) for an act of malpractice that occurs:

(A) after December 31, 2026; and

(B) before January 1, 2031.

(8) Two million two hundred fifty thousand dollars ($2,250,000) for an act of malpractice that occurs after December 31, 2030.

(b) A health care provider qualified under this article (or IC 27-12 before its repeal) is not liable for an amount in excess of **the following:**

(1) Two hundred fifty thousand dollars ($250,000) for an ~~occurrence~~ **act** of malpractice **that occurs:**

(A) after June 30, 1999; and

(B) before January 1, 2017.

(2) Four hundred fifty thousand dollars ($450,000) for an act of malpractice that occurs:

(A) after December 31, 2016; and

(B) before January 1, 2019.

(3) Five hundred twenty-five thousand dollars ($525,000) for an act of malpractice that occurs:

(A) after December 31, 2018; and

(B) before January 1, 2023.

(4) Six hundred thousand dollars ($600,000) for an act of malpractice that occurs:

(A) after December 31, 2022; and

(B) before January 1, 2027.

(5) Six hundred seventy-five thousand dollars ($675,000) for an act of malpractice that occurs:

(A) after December 31, 2026; and

(B) before January 1, 2031.

(6) Seven hundred fifty thousand dollars ($750,000) for an act of malpractice that occurs after December 31, 2030.

(c) Any amount due from a judgment or settlement that is in excess of the total liability of all liable health care providers, subject to subsections (a), (b), and (d), shall be paid from the patient's compensation fund under IC 34-18-15.

(d) If a health care provider qualified under this article (or IC 27-12 before its repeal) admits liability or is adjudicated liable solely by reason of the conduct of another health care provider who is an officer, agent, or employee of the health care provider acting in the course and scope of employment and qualified under this article (or IC 27-12 before its repeal), the total amount that shall be paid to the claimant on behalf of the officer, agent, or employee and the health care provider by the health care provider or its insurer is **the following:**

(1) Two hundred fifty thousand dollars ($250,000) **for an act of malpractice that occurs:**

(A) after June 30, 1999; and

(B) before January 1, 2017.

(2) Four hundred fifty thousand dollars ($450,000) for an act of malpractice that occurs:

(A) after December 31, 2016; and

(B) before January 1, 2019.

(3) Five hundred twenty-five thousand dollars ($525,000) for an act of malpractice that occurs:

(A) after December 31, 2018; and

(B) before January 1, 2023.

(4) Six hundred thousand dollars ($600,000) for an act of malpractice that occurs:

(A) after December 31, 2022; and

(B) before January 1, 2027.

(5) Six hundred seventy-five thousand dollars ($675,000) for an act of malpractice that occurs:

(A) after December 31, 2026; and

(B) before January 1, 2031.

(6) Seven hundred fifty thousand dollars ($750,000) for an act of malpractice that occurs after December 31, 2030.

The balance of an adjudicated amount to which the claimant is entitled shall be paid by other liable health care providers or the patient's compensation fund, or both.

(e) In the 2032 legislative session, the general assembly shall review:

(1) the direct file amount described in IC 34-18-8-6;

(2) the total amount recoverable for an act of malpractice described in subsection (a); and

(3) health care provider liability limits described in subsections (b) and (d).

SECTION 5. IC 34-18-14-4 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JANUARY 1, 2017]: Sec. 4. (a) If the possible liability of the health care provider to the patient is discharged solely through an immediate payment, the limitations on recovery from a health care provider stated in section 3(b) and 3(d) of this chapter apply. ~~without adjustment.~~

(b) If the health care provider agrees to discharge its possible liability to the patient through a periodic payments agreement, the amount of the patient's recovery from a health care provider in a case under this subsection is the amount of any immediate payment made by the health care provider or the health care provider's insurer to the patient, plus the cost of the periodic payments agreement to the health care provider or the health care provider's insurer. For the purpose of determining the limitations on recovery stated in section 3(b) and 3(d) of this chapter and for the purpose of determining the question under IC 34-18-15-3 of whether the health care provider or the health care provider's insurer has agreed to settle its liability by payment of its policy limits, the sum of ~~(1)~~ the present payment of money to the patient (or the patient's estate) by the health care provider (or the health care provider's insurer) plus ~~(2)~~ the cost of the periodic payments agreement expended by the health care provider (or the health care provider's insurer) must exceed:

(1) one hundred eighty-seven thousand dollars ($187,000) **for an act of malpractice that occurs:**

(A) after June 30, 1999; and

(B) before January 1, 2017; and

(2) seventy-five percent (75%) of the maximum amount a health care provider is responsible for under section 3(b) and 3(d) of this chapter for an act of malpractice that occurs after December 31, 2016.

(c) More than one (1) health care provider may contribute to the cost of a periodic payments agreement, and in such an instance the sum of the amounts expended by each health care provider for immediate payments and for the cost of the periodic payments agreement shall be used to determine whether the ~~one hundred eighty-seven thousand dollar ($187,000)~~ requirement in subsection (b) has been satisfied. However, one (1) health care provider or its insurer must be liable for at least fifty thousand dollars ($50,000).

SECTION 6. IC 34-18-15-3 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JANUARY 1, 2017]: Sec. 3. If a health care provider or its insurer has agreed to settle its liability on a claim by payment of its policy limits ~~of two hundred fifty thousand dollars ($250,000),~~ **established in IC 34-18-14-3(b) and IC 34-18-14-3(d),** and the claimant is demanding an amount in excess of that amount, the following procedure must be followed:

(1) A petition shall be filed by the claimant in the court named in the proposed complaint, or in the circuit or superior court of Marion County, at the claimant's election, seeking:

(A) approval of an agreed settlement, if any; or

(B) demanding payment of damages from the patient's compensation fund.

(2) A copy of the petition with summons shall be served on the commissioner, the health care provider, and the health care provider's insurer, and must contain sufficient information to inform the other parties about the nature of the claim and the additional amount demanded.

(3) The commissioner and either the health care provider or the insurer of the health care provider may agree to a settlement with the claimant from the patient's compensation fund, or the commissioner, the health care provider, or the insurer of the health care provider may file written objections to the payment of the amount demanded. The agreement or objections to the payment demanded shall be filed within twenty (20) days after service of summons with copy of the petition attached to the summons.

(4) The judge of the court in which the petition is filed shall set the petition for approval or, if objections have been filed, for hearing, as soon as practicable. The court shall give notice of the hearing to the claimant, the health care provider, the insurer of the health care provider, and the commissioner.

(5) At the hearing, the commissioner, the claimant, the health care provider, and the insurer of the health care provider may introduce relevant evidence to enable the court to determine whether or not the petition should be approved if the evidence is submitted on agreement without objections. If the commissioner, the health care provider, the insurer of the health care provider, and the claimant cannot agree on the amount, if any, to be paid out of the patient's compensation fund, the court shall, after hearing any relevant evidence on the issue of claimant's damage submitted by any of the parties described in this section,

determine the amount of claimant's damages, if any, in excess of the ~~two hundred fifty thousand dollars ($250,000)~~ **health care provider's policy limits established in IC 34-18-14-3(b) and IC 34-18-14-3(d)** already paid by the insurer of the health care provider. The court shall determine the amount for which the fund is liable and make a finding and judgment accordingly. In approving a settlement or determining the amount, if any, to be paid from the patient's compensation fund, the court shall consider the liability of the health care provider as admitted and established.

(6) A settlement approved by the court may not be appealed. A judgment of the court fixing damages recoverable in a contested proceeding is appealable pursuant to the rules governing appeals in any other civil case tried by the court.

(7) A release executed between the parties does not bar access to the patient's compensation fund unless the release specifically provides otherwise.

SECTION 7. IC 34-18-18-1 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JANUARY 1, 2017]: Sec. 1. When a plaintiff is represented by an attorney in the prosecution of the plaintiff's claim **subject to IC 34-18-8-4,** the plaintiff's attorney's fees ~~from any award made from the patient's compensation fund~~ may not exceed, **for an act of malpractice committed:**

(1) before January 1, 2017, fifteen percent (15%) of any recovery from the fund; **and**

(2) after December 31, 2016, thirty-two percent (32%) of any recovery under IC 34-18-14-3.

COMMITTEE REPORT

Madam President: The Senate Committee on Civil Law, to which was referred Senate Bill No. 28, has had the same under consideration and begs leave to report the same back to the Senate with the recommendation that said bill DO PASS.

(Reference is to SB 28 as introduced.)

BRAY, Chairperson

Committee Vote: Yeas 7, Nays 0

COMMITTEE REPORT

Mr. Speaker: Your Committee on Judiciary, to which was referred Senate Bill 28, has had the same under consideration and begs leave to report the same back to the House with the recommendation that said bill be amended as follows:

Delete the title and insert the following:

A BILL FOR AN ACT to amend the Indiana Code concerning civil law and procedure.

Delete everything after the enacting clause and insert the following:

(SEE TEXT OF BILL)

and when so amended that said bill do pass.

(Reference is to SB 28 as printed January 27, 2016.)

STEUERWALD

Committee Vote: yeas 11, nays 1.